

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ORLO J. AMOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil No. CV-12-0094-RHW

Crim. No. CR-08-0087-RHW-1

**ORDER DISMISSING PETITION  
AND DIRECTING SERVICE**

The Petitioner, a federal prisoner housed at FCI Sheridan, Oregon, brings this *pro se* action purportedly pursuant to 28 U.S.C. § 2241, claiming "actual innocence." The Petitioner failed to pay the filing fee or move to proceed in forma pauperis, but the Court finds there is no need to delay resolution of the case on that basis. For the reasons discussed, the Court will construe this as a Motion for Reduction in Sentence and dismiss the Section 2241 habeas petition.

**A. Dismissal of Section 2241 Petition**

***1. This Court Lacks Jurisdiction***

An initial defect with the petition is that Mr. Amos fails to name a proper respondent. The proper respondent is Petitioner's immediate custodian, that is, the warden of the facility in which he is incarcerated. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004). This is not a defect that the Petitioner can cure by amendment, because this Court lacks personal jurisdiction over the warden in Oregon.

1           **2. The Petition Fails on its Merits**

2           “Generally, motions to contest the legality of a sentence must be filed under §  
3 2255 in the sentencing court, while petitions that challenge the manner, location, or  
4 conditions of a sentence's execution must be brought pursuant to § 2241 in the  
5 custodial court.” Hernandez v. Campbell, 204 F.3d 861, 864 (9th Cir.2000) (per  
6 curiam). On January 21, 2010, the Court sentenced the Petitioner to 100 months  
7 imprisonment after he pleaded guilty to distribution of five grams or more of a  
8 mixture or substance containing cocaine base. ECF No. 105; 21 U.S.C. § 841(a)(1).  
9 The Petitioner’s current challenge is directed at that sentence, but the appropriate  
10 vehicle for challenging the legality of a federal sentence is a § 2255 motion.  
11 Judgment was entered in Petitioner's criminal action on February 1, 2010. Mr. Amos  
12 did not appeal; he did not file a Section 2255 motion. It appears that a Section 2255  
13 motion is now time-barred. 28 U.S.C. § 2255(f).

14           Ordinarily, the “restrictions on the availability of a § 2255 motion cannot be  
15 avoided through a petition under 28 U.S.C. § 2241.” Stephens v. Herrera, 464 F.3d  
16 895, 897 (9th Cir.2006). The Court may entertain a Section 2241 petition, however,  
17 when a Section 2255 motion is “inadequate” or “ineffective.” Hernandez v. Campbell,  
18 204 F.3d 861, 864-65 (9th Cir. 2000). Petitioner has not made this showing.

19           Relief under 28 U.S.C. § 2241 would only be available if Petitioner was barred  
20 from proceeding under Section 2255, and he is actually innocent. *See* Alaimalo v.  
21 United States, 636 F.3d 1092, 1096 (9th Cir. 2011). Mr. Amos has not shown that he  
22 was prevented in any way from filing a Section 2255 motion in the sentencing court,  
23 and he cannot show that an obstruction prevented him from presenting these claims.  
24 Indeed, he never filed a Section 2255 motion, and he offers no explanation for his  
25 failure to do so. Section 2255 is not inadequate and ineffective simply because a  
26 motion would now be time-barred. *See, e.g.* Abdullah v. Hedrick, 392 F.3d 957, 959  
27 (8th Cir. 2004) .

28           Next, the Petitioner asserts the Fair Sentencing Act of 2010 modified the statute

1 under which he was criminally convicted, thereby rendering him "factually innocent,"  
2 and entitling him to a new trial. But the Act did not make the distribution of cocaine  
3 base legal. It only raised from five grams to twenty-eight grams the amount of cocaine  
4 base required to trigger the five- and ten-year mandatory statutory sentences. Having  
5 failed to demonstrate that he was barred from proceeding under Section 2255 and that  
6 he is actually innocent, Petitioner is not entitled to proceed with this action under 28  
7 U.S.C. § 2241.

8 **B. Motion for Sentence Reduction**

9 Because the thrust of the Petitioner's arguments center on the Fair Sentencing  
10 Act, the Court presumes that he seeks retroactive application of the sentencing  
11 guidelines. 18 U.S.C. § 3582(c)(2). The Court will construe this petition as such a  
12 motion, and it directs service on the Government for a response.

13 Accordingly, **IT IS HEREBY ORDERED:**

14 1. The Petitioner's Petition Under 28 U.S.C. § 2241 is **DISMISSED**, with  
15 prejudice. The District Court executive is directed to **CLOSE** this civil case.

16 2. Because an appeal from this decision could not be taken in good faith, there  
17 is no basis upon which to issue a Certificate of Appealability. 28 U.S.C. § 2253(c);  
18 FED. R. APP. P. 22(b).

19 3. The District Court Executive is directed to file this petition as a Motion for  
20 Sentence Reduction in the Petitioner's criminal case, No. 08-CR-0087-RHW-1. The  
21 Government shall respond on or before **February 29, 2012**. The Motion will be heard  
22 without oral argument on **March 15, 2012**.

23 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
24 Order and forward copies to counsel.

25 **DATED** this 17<sup>th</sup> day of February, 2012.

26  
27 s/Robert H. Whaley  
28 ROBERT H. WHALEY  
United States District Judge

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